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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969

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No. 240

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JOSEPH COVELLO, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

---

## PETITION FOR REHEARING

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## PETITION FOR REHEARING

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Petitioner Joseph Covello prays that this Court grant rehearing of its order of October 20, 1969, denying the Petition for a Writ of Certiorari herein,[1] and that a writ of certiorari issue to review the following question, decided by the Court of Appeals but not presented in the Petition for Certiorari:

> Whether Section 605 of the Federal Communications Act of 1934, Clause 1, prohibits a telephone company from disclosing the records of a subscriber's toll calls to a law enforcement agency, in the absence of a subpoena or other valid process.

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[1] An Order suspending the order denying the petition for a writ of certiorari, pending the timely filing and disposition of a petition for rehearing, was entered by Justice Harlan on November 4, 1969.

## STATUTE INVOLVED

The Communications Act of 1934, Section 605, Clause 1, 48 Stat. 1103, 47 U.S.C.A. § 605 (1962 ed.) provides:

> "§ 605. *Unauthorized publication or use of communications*
>
> No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; . . . ."

The Communications Act of 1934, Section 605, Clause 1, as amended by the Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351, Title III, § 803, 82 Stat. 223, 47 U.S.C.A. § 605 (1969 Supp.) provides:

> "§ 605. *Unauthorized publication or use of communications*
>
> Except as authorized by chapter 119, Title 18, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than

the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority . . . ."

## REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

The intervening circumstance which warrants rehearing is the rendition of a decision of the Court of Appeals for the Sixth Circuit, handed down September 11, 1969 and first reported in the BNA Criminal Law Reporter of October 8, 1969, which conflicts with the decision below with respect to construction of Clause 1 of Section 605 of the Federal Communications Act of 1934. The Sixth Circuit decision was rendered in the cases of *DiPiazza* v. *United States* and *Deming* v. *United States,* 6 CrL 2025, Nos. 18593-18594 (6th Cir., Sept. 11, 1969). The majority and dissenting opinions in these cases, insofar as pertinent hereto, are printed in the appendix to this petition for rehearing.

In the instant case, the Court of Appeals for the Second Circuit held, in Point I of its opinion (Appendix to Petition for Certiorari, pp. 6a-10a), that Clause 1 of Section 605 of the Federal Communications Act of 1934 did not apply to the telephone company's business records of a subscriber's toll calls—so-called "toll slips". The Court of Appeals therefore found it unnecessary to reach the question of whether an FBI

agent's informal oral request for disclosure of such records constitutes "demand of other lawful authority", within the meaning of Clause 1 of Section 605—the clause which prohibits telephone company personnel from divulging "the existence" of interstate telephone communications except under certain conditions specified in the statute:

> "No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, . . . or in response to a subpena issued by a court of competent jurisdiction, or *on demand of other lawful authority;* . . . ." 47 U.S.C.A. § 605 (1962 ed.), Clause 1. (Emphasis supplied.)

At the time that the Second Circuit's opinion was handed down, there was no other appellate decision on the application of Section 605 to toll call records, and the petition for certiorari did not raise this question for review.

In its decision of September 11, 1969, the Sixth Circuit, affirming the ruling of the United States District Court for the Southern District of Ohio, held that telephone company toll records had been validly obtained by means of Internal Revenue Service summons issued under 26 U.S.C. § 7602, because the summons constituted "other lawful authority" within the meaning of Section 605, Clause 1. *DiPiazza* and

*Deming* v. *United States, supra,* slip opinion at pp. 5-8 (Appendix, pp. 5a-8a, *infra*). The majority held:

> "In our view the record establishes that the telephone company divulged its records to IRS in response to a demand of lawful authority as expressly authorized by 47 U.S.C. § 605." (Slip opinion at p. 7, Appendix, *infra,* pp. 7a-8a.)

The dissenting opinion of Judge Celebreeze:

> ". . . agree[s] with the majority that telephone company toll records containing an individual's long distance calls are protected by § 605 of the Communications Act . . .
>
> "I cannot agree with the majority's conclusion that the Internal Revenue summons that were used to obtain the toll slips were 'other lawful authority' within the purview of § 605." (Slip opinion at p. 16, Appendix, *infra,* pp. 11a-12a.)

Both the majority and dissent thus differed with the holding of the Second Circuit herein, that Congress did not intend Section 605 to protect against divulgence of toll call records.

In the instant case, the toll call records were disclosed to the FBI without the issuance of any process of any Court or agency (277a-278a)[2]; and the FBI, unlike the IRS, has no power to issue process for records which it desires to examine. The Sixth Cir-

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[2] Record references are to the page numbers of the printed Appendix in the Court of Appeals.

For examples of "toll slips", see the Exhibits photographically reproduced in that Appendix (500a-527a). A "toll slip" lists information similar to that appearing on the subscriber's long distance phone bill, including the numbers and localities called, but with additional detail as to the precise time and duration of each toll call.

cuit's construction of Section 605 not only would alter the outcome of the instant case, but presents a conflict between the Circuits concerning a question of general importance to the administration of federal criminal justice: the validity of the longstanding practice of the FBI in securing records of subscribers' toll calls from the telephone company, by informal request and without legal process.

The likelihood that this FBI practice is widespread is suggested by the convenient arrangement illustrated in the instant record, whereby the New York FBI office and the New York Telephone Company office are conveniently located in the same building (88a, 277a). Such juxtaposition of facilities seems unlikely to be inadvertent, or limited to the City of New York. In the instant case, the FBI agent simply went downstairs in his own building and obtained the records of the subscriber's toll calls from a telephone company secretary, who acted at the direction of a telephone company employee described as a "Special Agent of the New York Telephone Company" (277a-278a). The FBI agent was seeking the records on the basis of an alleged "anonymous letter", the source of which he did not attempt to determine (75a, 85a, 542a), so that a search warrant for the records would not have been obtainable on the basis of the information then known to the FBI agent. The instant record also shows the use in some instances of a form letter type of request to the New Jersey Bell Telephone Company for a "toll check" (on petitioner's home telephone number) in an investigation pertaining to "John Doe". (537a, 538a.)

The practices illustrated by this record represent a threat to the privacy of every telephone subscriber

who makes long distance calls. For if disclosure of a subscriber's toll call records is not prohibited by Clause 1 of Section 605, which prohibits telephone company personnel from disclosing "the existence" of a telephone communication without a subpoena or "demand of other lawful authority", then the company is free to disclose such records upon any informal request of a law enforcement official, and probably upon the request of any inquiring private detective or busybody whose inquiry a telephone company employee chooses to honor.[3]

The opinions in *DiPiazza* and *Deming* v. *United States, supra,* considered the situation where a form of legal process (an IRS summons) had been issued for production of the telephone company toll records. However, on petition for rehearing in *DiPiazza* it has been asserted that the record shows other instances in which telephone company toll records were turned over to the IRS without any legal process. Application for Rehearing or Rehearing In Banc, pp. 1-4, *DiPiazza* v. *United States,* No. 18,593, Sixth Circuit, filed October 13, 1969. This petition for rehearing (still pending in the Sixth Circuit at this writing) thus presents a like factual situation to the one herein, where no legal process was issued for production of the toll call records. Whatever the outcome of the pending petition for rehearing in *DiPiazza,* it appears likely that the unsuccessful party will file a petition

[3] But if "demand of other lawful authority" in Section 605 is construed to include an informal oral request by a law enforcement agent, then such informal request could be distinguished from that of a purely private party; the latter request would be barred if such records were held to be covered by § 605, while the former request could be held within the exception for a "demand of other lawful authority".

for certiorari raising substantially the same question presented herein, as well as the closely related question of what constitutes a valid "demand of other lawful authority" within the meaning of Section 605.[4]

In another decision handed down the same day as *DiPiazza* and *Deming* v. *United States, supra,* the Sixth Circuit remanded to the United States District Court for the Eastern District of Michigan, the case of *United States and Richard Daguanno, Special Agent, Internal Revenue Service* v. *Michigan Bell Telephone Co.*, 6 CrL 2027, No. 19073 (6th Cir., Sept. 11, 1969). (The slip opinions therein are printed in the Appendix to this Petition for Rehearing, pp. 19a-24a, *infra.*) The remand was to consider whether the construction of Section 605 in *DiPiazza* v. *United States, supra,* was affected by the amendment of Section 605 by Title III, § 803, of the Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351, which had been enacted subsequent to the District Court decision in *DiPiazza* but prior to the District Court decision in *United States and Daguanno* v. *Michigan Bell Telephone Co.* The question presented in the instant petition would also appropriately involve consideration of the effect of the amendment to Section 605 enacted by the Omnibus Crime Control and Safe Streets Act of 1968. Although the Court of Appeals for the Second Circuit stated in the instant case: "The recent amendment to 47 U.S.C. § 605 by the

[4] The instant case also will involve the issue of the meaning of the statutory language "demand of other lawful authority", if it is first held that Section 605, Clause 1, does apply to divulgence of telephone company toll records. The opinion below left open the question of whether an FBI agent's request was "demand of other lawful authority" because, the opinion held, § 605 did not cover toll call records. (Appendix to Petition for Certiorari, p. 10a.)

Omnibus Crime Control and Safe Streets Act of 1968 does not alter the substance of the original statute set forth in the text above" (Appendix to Petition for Certiorari, p. 8a, n.6), a substantial question exists as to whether Congress worded amended Section 605 so as to make it mean the *opposite* of original Section 605, Clause 1. The amended Section 605 appears by its terms to prohibit divulgence of those telephone company records covered by Clause 1 *even when they are sought by subpena or other legal process.* The amended version of Section 605 provides:

> "Except as authorized by chapter 119, Title 18, *no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof,* except through authorized channels of transmission or reception, *(1) to any person other than the addressee, his agent, or attorney,* (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, *(5) in response to a subpena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority . . . .*" 47 U.S.C.A. § 605 (1969 Supp.) (emphasis supplied).[5]

[5] The language is not misprinted in U.S.C.A. The same language appears in the bill as set forth in the Senate Committee Report, S. Rep. No. 1097, 90th Cong., 2d Sess., at 19. The language is paraphrased in the same manner in setting forth the purpose of the amendment, S. Rep. No. 1097 at 107-08.

Unless Section 605 has no application to telephone company toll records—as the Second Circuit but not the Sixth Circuit held—the language of amended Section 605 thus appears to prohibit disclosure and evidentiary use of such records even in response to process of a court or agency. Whether Congress has inadvertently or otherwise chosen language which renders the meaning of Clause 1 opposite to that of the pre-amendment language, is a subsidiary question of significant importance to the administration of criminal justice and protection of the telephone subscriber's right of privacy.

Respectfully submitted,

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Dated: November 14, 1969

**CERTIFICATE**

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and that it is restricted to grounds specified in Rule 58(2) of the Rules of this Court.

ROBERT L. WEINBERG

# APPENDIX

# APPENDIX

**Excerpts From Opinions of the United States Court of Appeals for the Sixth Circuit in DiPiazza v. United States and Deming v. United States.**

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 18593-18594

SAM (SALVATORE) DIPIAZZA, *Defendant-Appellant,*

v.

UNITED STATES, *Plaintiff-Appellee.*

WILLIAM CLYDE DEMING, *Defendant-Appellant,*

v.

UNITED STATES, *Plaintiff-Appellee.*

Appeal from the United States District Court for the Southern District of Ohio, Western Division.

Decided September 11, 1969.

Before: PHILLIPS and CELEBREZZE, Circuit Judges, and MCALLISTER, Senior Circuit Judge.

PHILLIPS, Circuit Judge. DiPiazza and Deming appeal from their convictions under 18 U.S.C. §§ 371 and 1952 on seven counts of use of interstate telephone facilities for carrying on a business enterprise of gambling in violation of state law and one count of conspiracy so to carry on that business. They were found guilty on all counts by a jury after a lengthy trial before District Judge David S. Porter.

The voluminous evidence introduced by the Government established a large scale interstate illegal bookmaking and layoff gambling operation. This operation was carried on by telephone between Cincinnati, Ohio, Fort Thomas, Kentucky, New Orleans, Louisiana, and other points. Accord-

ing to the evidence DiPiazza primarily was based in New Orleans and Deming in Cincinnati. The gambling enterprise between these two defendants was shown to have exceeded $400,000 in one month.

Appellants challenge the Government's obtaining certain telephone company long distance toll card records, the Government's use of the toll records, and the sufficiency of search warrants under which the bulk of the evidence against the appellants was seized. Other errors alleged will be mentioned later in this opinion.

In January 1966 special agents of the Internal Revenue Service at Cincinnati received a communication from the Internal Revenue Office at Las Vegas, Nevada, requesting that a telephone number be checked, information having been received that it was being called by Las Vegas bookmakers. The number was determined to be located in the basement apartment at 3808 Woodford Road, Silverton, Ohio, a Cincinnati suburb.

In June, 1966 a special IRS agent at Louisville informed the Cincinnati office that an undercover agent had placed bets with a certain person who had been using two telephones in Lexington, Kentucky. From the toll records of the Woodford Road telephone it was determined that calls had been placed from that number to the two Lexington numbers.

The telephone at 3808 Woodford was listed to Harry Acker, a fictitious listing. Surveillance by IRS agents disclosed Deming to be a frequenter of the Woodford premises. Examination of telephone company toll records, obtained by IRS summons, revealed that the telephone at 3808 Woodford and the telephone at Deming's residence in Fort Thomas, Kentucky, had been and were being used to make numerous toll calls to persons known to be prominent bookmakers in various cities.

Based upon the affidavits of Special Agent Guy I. Wetherell, IRS Intelligence Division, search warrants were is-

sued. The warrant for the 3808 Woodford address was issued by a United States Commissioner for the Southern District of Ohio. The warrant for Deming's residence at Fort Thomas was issued by a United States Commissioner for the Eastern District of Kentucky.

The raid on the Woodford Road property was led by Special Agent Frank Carrington, who at the time of the trial was on a Ford Foundation grant and assigned as a legal advisor to the vice squad of the Chicago Police Department. He is a licensed attorney and a graduate of the University of Michigan Law School.

Deming was present at the Woodford address when the search warrant was executed there. A paper sack was seized containing betting records that had been torn into thousands of small pieces. More than 20,000 pieces of paper were assembled by Carrington and agents under his control. Carrington identified these reassembled documents, testifying that they included bet slips, balance sheets and "recap" sheets, all pertaining to the bookmaking and lay-off horse betting operation between Deming and other individuals, including DiPiazza. Deming conceded that each one of these reconstructed slips was written solely in his own handwriting.

A raid on Deming's residence at Fort Thomas also produced racing forms, telephone toll records and gambling paraphernalia.

The FBI raided DiPiazza's hotel room in New Orleans on January 8, 1966, which was within the period of the conspiracy charged in the indictment. Papers taken off DiPiazza contained Deming's telephone numbers in Fort Thomas and on Woodford Road. Deming's Fort Thomas telephone had an unlisted number. It was shown in DiPiazza's papers as the equivalent of the Woodford Road telephone number. This established, in conjunction with other evidence, a connection between DiPiazza and Deming.

Toll records of the Cincinnati and Suburban Bell Telephone Company were subpoenaed and put into evidence. These are records which were maintained by the telephone company in the ordinary and normal course of its business for the Deming telephones at Woodford Road and at Fort Thomas. These records disclosed hundreds of calls, often as many as five per day, to premises occupied by DiPiazza in New Orleans, and calls to the Hilton Hotel in New York at times when DiPiazza was registered there. The search of Deming's apartment, residence and automobile produced duplicates of most of these same toll records.

We find no reversible error in the record and affirm the convictions.

(1) The Toll Records

The principal issue on this appeal is whether the Government's evidence of the telephone calls in question was secured by the wrongful procurement of the telephone records in violation of Section 605 of the Communications Act, 47 U.S.C. § 605. This question arises first with respect to whether there was probable cause for the issuance of the search warrants. It is further contended that the evidence was unlawfully introduced and received at the appellant's trial.

A.

Appellants contend that the toll records of long distance telephone calls constitute an "interception" of a message in violation of section 605.

The toll records obtained by IRS in its investigation are the same type of long distance records kept by the telephone company for all telephones. These records contain substantially the same information that is furnished each month to the customer as a part of his billing, i.e., the date of the call, the destination called, the telephone number to which each call is placed, the telephone number where the call originated, and the amount of the charge for the service. These records contain no information as to the

persons participating in the call or the subject matter of the conversation.

A telephone subscriber or user authorizes the telephone company to intercept his calls to the extent reasonably necessary for purposes of computing his telephone charges. See *Brandon* v. *United States*, 382 F.2d 607 (10th Cir.); *United States* v. *Gallo*, 123 F.2d 229 (2d Cir.); *United States* v. *Russo*, 250 F.Supp. 55 (E.D. Pa.).

> "To hold that recording by the company of the fact of a call between two of its telephones is an unauthorized interception of a communication would require a construction of the statute extending it beyond either its purpose or its words. The statute was not intended to proscribe long-standing, reasonable business practices of communication companies. When a person takes up a telephone he knows that the company will make, or may make, some kind of a record of the event, and he must be deemed to consent to whatever record the business convenience of the company requires. If by any stretch of language the making of such a record could be termed an 'interception' of the communication, it is one which the sender has authorized. Hence it is not within the ban of the statute." *United States* v. *Gallo*, 123 F.2d 229, 231 (2d Cir.).

We find nothing in the language or legislative history of 47 U.S.C. § 605 indicating any congressional purpose to preclude the telephone company from making records of long distance toll calls.

Therefore we hold that the maintenance of toll records in the routine course of business does not constitute "interception" of wire communications in violation of § 605 and is not wiretapping.

B.

Having held that the maintenance of the toll records and the making of the records does not constitute an "interception" forbidden by § 605, we now deal with the appel-

lants' contention that the submission of the records to the IRS was a "divulgence" forbidden by § 605.

Only the first clause of 47 U.S.C. § 605 could be construed as prohibiting the telephone company from turning its records over to the Government since there was no interception of a message in violation of section 605's later clauses. The clause is as follows:

> "No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, or effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or *on demand of other lawful authority;* . . ." (Emphasis supplied).

The Government maintains that the IRS summons was issued under 26 U.S.C. § 7602 and constituted "other lawful authority" for the divulgence of the toll records revealing the existence of the telephone calls. In an addendum to his findings of fact and conclusions of law on the defendants' suppression motions prior to the trial the District Judge held that the obtainingof the toll slips under the summons was obtaining them under "other lawful authority" within the meaning of section 605. Implicit in that holding is a finding that obtaining evidence for a criminal prosecution was not the sole purpose of the investigation. We find no evidence in the record to support a contention that this finding is in error. The appellants have not pointed out to this Court or to the District Court any evidence that the summons were improper. The agent who

authorized the issuance of the summons testified as a witness at the suppression hearing, but on cross-examination the appellants did not even undertake to develop any facts to show that the summonses were issued for an unlawful purpose.

Where the investigation may produce both civil and criminal evidence, the summons under section 7602 is a proper device for obtaining records. See *United States* v. *Powell*, 379 U.S. 48; *Ryan* v. *United States*, 379 U.S. 61, aff'g 320 F.2d 500 (6th Cir.). The burden is on the party objecting to the summons to show that it was used for an unlawful purpose. See *United States* v. *Powell, supra* at 58; *United States* v. *Nunnally*, 278 F.Supp. 843 (D.C. Tenn.). That burden is not met by merely showing that the agent issuing the summons is a special agent of the IRS. See *Powell* v. *United States, supra* (summons to appear before special agent); *Tillotson, Special Agent, IRS* v. *Boughner*, 225 F.Supp. 45, motion denied, 327 F.2d 982, aff'd 333 F.2d 515 (7th Cir.), cert. denied, 379 U.S. 913 (Special Agent summons with unknown taxpayer); *Mullins, Special Agent, IRS* v. *Angiulo*, 227 F.Supp. 524, aff'd 338 F.2d 820 (1st Cir.), cert. denied, 380 U.S. 963 (Special Agent summons). But see *United States* v. *Kleckner*, 273 F.Supp. 251 (S.D. Ohio), appeal dismissed on motion of appellants, 382 F.2d 1022.

It should be remembered that when the earlier summons was issued the IRS had no knowledge that Deming or DiPiazza were involved. The first name disclosed in the investigation was that of Harry Acker, who was listed as the subscriber of the Woodford Road telephone number with which the investigation was begun. At the time this summons was issued IRS could not have known what kind of violations would be disclosed by the investigation. There was a possibility that there would be a finding of civil tax liability.

In our view the record establishes that the telephone company divulged its records to IRS in response to a demand

of lawful authority as expressly authorized by 47 U.S.C. § 605. The summonses were issued in conformity with and pursuant to the authority of 26 U.S.C. § 7602. A finding that the furnishing of the toll records for Deming's telephones at Woodford Road and at his residence at Fort Thomas constituted a violation of 47 U.S.C. § 605 cannot be supported on this record.

In our opinion the decision in *United States* v. *Caplan*, 255 F.Supp. 805 (E.D. Mich.), relied upon by appellants, is distinguishable from the present case in at least two particulars: (1) that case involved the use of an unauthorized pen register, which, unlike making long distance toll records, is not an activity of the telephone company consented to by the subscriber and (2) the District Judge in that case found as a fact that the IRS summons was issued to investigate possible criminal violations and not to determine civil liability. In the present cases District Judge Porter, in the addendum to his findings of facts and conclusions of law on the motion to suppress, affirmatively found that the obtaining of the long distance toll slips in response to IRS summons was pursuant to "demand of lawful authority" as that phrase is used in 47 U.S.C. § 605.

C.

The appellants contend that the toll records could only be obtained under a search warrant, citing *Katz* v. *United States*, 389 U.S. 347, and *Hanna* v. *United States*, 393 F.2d 700 (5th Cir.). We find this contention without merit. *Katz* was an electronic surveillance case in which the Government eavesdropped on telephone conversations. The Court said, "One who occupies [a telephone booth] . . ., shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." 389 U.S. at 352. He is not entitled to assume that the fact that he is making a call will be a secret. Similarly one who uses a telephone to make long distance calls is not entitled to assume that the tele-

phone company will require a warrant before submitting its record in response to an IRS summons.

The Supreme Court recently held that *Katz* v. *United States* is "to be applied only to cases in which the prosecution seeks to introduce the fruits of electronic surveillance conducted after December 18, 1967." *Desist* v. *United States,* 394 U.S. 244, 254. Any eavesdropping in the present cases occurred well before that date.

*Hanna* v. *United States, supra,* was a case of wiretapping by the telephone company and, although the appellants did not mention it in their briefs, was written in three opinions including a dissent. The same panel reversed itself in a unanimous opinion at 404 F.2d 405.

We find no Fourth Amendment right of the appellants violated in the summoning of the toll records.

We hold that the toll records were properly obtained by the Government and were usable both as a basis for the search warrants and as evidence at trial against the appellants.

(2) Sufficiency of the search warrants

Appellant Deming challenges the search warrants on the grounds that they are invalid under *Spinelli* v. *United States,* 393 U.S. 410, and *Aguilar* v. *Texas,* 378 U.S. 108; that they are supported by differing statements; and that there is a discrepancy between a date alleged in the statements and what was subsequently proved by the evidence. We find that the warrants were issued on a showing of probable cause and were in no way defective. The statement which is challenged recites the qualifications of the Special Agent making the statement and then recites the following facts on which probable cause was found by the District Court: The Cincinnati office of the IRS was informed in February 1966 (the date is discussed below) that suspected bookmakers in Las Vegas, Nevada were calling a Cincinnati telephone number. The Cincinnati IRS determined the name of the subscriber to the number and examined the toll records discussed above. In June

1966 the affiant was informed by another named Special Agent that a third named Special Agent had been making bets with a person in Lexington, Kentucky, by calling two numbers there. Calls had been placed from the Lexington numbers to the Cincinnati number. Calls had also been placed between the Cincinnati number and that of Sam DiPiazza, who was a nationally known bookmaker, and that of an address in Louisville, Kentucky, for which a federal wagering stamp had been issued. The affiant concluded that these telephone calls, in his judgment as an experienced investigator, showed a pattern of bookmaking operation at the Cincinnati number on Woodford Road.

The statement further recited that the Woodford Road building had been put under surveillance and that a certain automobile, registered to Deming's mother at Deming's address in Fort Thomas, Kentucky, had been observed on eight occasions outside the building and Deming had been observed driving it. Deming was known to the affiant as a bookmaker and had been arrested for wagering law violations and had at one time a wagering stamp. The toll records revealed a number of calls from Deming's home number to the two Lexington numbers at which the Special Agent had placed wagers.

Deming urges that this Court hold that there was not probable cause because the statement did not recite the name of the informer who told the IRS in Cincinnati in early 1966 that gamblers were calling the Cincinnati number.

* * * * * * * * * *

. . . We concur with the conclusion of the District Court that probable cause was shown in all the affidavits.

* * * * * * * * * *

(5) Conclusion

Other contentions made by the appellants have been considered, and we are of the opinion that they are without merit. The District Court made no error in overruling the various motions to suppress.

Affirmed.

CELEBREZZE, Circuit Judge, dissenting. I respectfully dissent. I agree with the majority that telephone company toll records containing an individual's long distance calls are protected by § 605 of the Communications Act. The principal issue before us is whether the Government violated that section by using the § 7602 summons to obtain the telephone records that led ultimately to Appellant's convictions. If the Government did violate § 605 there was no probable cause for the search warrants. *Spinelli v. United States*, 393 U.S. 410 (1969). Without the toll records, the Government could not establish that a bookmaking network existed between Deming's telephones, DiPiazza's New Orleans telephone, and the two telephones in Lexington, Kentucky.[1] Stripped of this information, the only evidence the Government had when it went before the Commissioners was an unsupported tip from Las Vegas, Nevada, and visual surveillance which disclosed nothing more than the fact that Deming was seen near the Woodford Road apartment. The U.S. Supreme Court held in *Spinelli* that such circumstances do not establish probable cause.

I cannot agree with the majority's conclusion that the Internal Revenue summons that were used to obtain the toll slips were "other lawful authority" within the pur-

[1] I.R.S. agents also summoned toll records for telephone numbers found in Deming's telephone records, including those for two telephone numbers used by Kuhn. Kuhn was indicted along with Appellants as a co-conspirator and convicted largely on the basis of the evidence seized in the raids on Deming's premises. This Court today affirmed his conviction, No. 19,030. Kuhn's telephone numbers were the Lexington, Kentucky telephone numbers named in the affidavits supporting the search warrants. The toll records for his numbers showed a high volume of calls to Deming's telephone numbers. Appendix, pp. 155 and 157. The toll records, which were summoned well before June of 1966, established the bookmaking network alleged in the affidavits. Assuming that an I.R.S. agent did place bets with parties at the Lexington, Kentucky telephone numbers in June of 1966 as alleged in the affidavits, it was not because of his own independent investigation but because of the information contained in the toll records.

view of § 605. I am of the opinion that the record clearly establishes that Government agents used the summons for the sole purpose of procuring evidence to prosecute and convict Appellants of conspiracy to violate, and of violating federal criminal statutes. This is contrary to the U.S. Supreme Court's holding in *Reisman* v. *Caplin,* 375 U.S. 440 (1964), where the Court said that the Government could not use the § 7602 summons for that purpose.

When the Government conducts searches for evidence of crime it must proceed by lawful authority. No less is required under § 605 which embodies a congressional mandate that the privacy of telephone users shall be free from arbitrary invasion by government officials. Consequently, the U.S. Supreme Court has held that when such an invasion does take place evidence seized as a result may not be used in a criminal prosecution against the parties to the communication, in these cases, Deming and DiPiazza.[2] These holdings accord with the rule excluding evidence seized in violation of the Fourth Amendment, to which § 605 has often been equated.[3]

The record in these cases establishes that Government agents obtained the evidence which led to Appellants' indictments and convictions through an indiscriminate abuse of civil process, the § 7602 summons.

The majority opinion states that "[t]he F.B.I. raided DiPiazza's hotel room in New Orleans on January 8, 1966, which was well within the period charged in the indict-

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[2] And Kuhn in No. 19,030, *Nardone* v. *United States,* 302 U.S. 379 (1937); on second appeal, 308 U.S. 338 (1939); *Goldstein* v. *United States,* 316 U.S. 114 (1942). The term "sender" has been held to include both parties to the telephone conversation. *United States* v. *Tane,* 329 F.2d 848 (2d Cir. 1964); see *Rathburn* v. *United States,* 355 C.S. 107, 113 (1957) (Dissenting opinion of Frankfurter, J.).

[3] *Goldstein* v. *United States,* 316 U.S. 114 (1942); see generally *Katz* v. *United States,* 389 U.S. 347 (1947).

ment." It is important to note that the F.B.I. raided DiPiazza's hotel room one month before the Government received its alleged Las Vegas information concerning Deming's Woodford Road telephone number. It is also important to note that the Government admitted during the hearing on on the motion to suppress that electronic surveillance had been conducted against DiPiazza by both the F.B.I., which arrested DiPiazza, and the I.R.S., which arrested Deming, his co-conspirator.

Upon the arrest of DiPiazza on January 8, 1966, the F.B.I. obtained from his person papers containing Deming's Woodford Road telephone number. Although the I.R.S. informed the Commissioners that it summoned Deming's telephone toll records (Woodford Road) in February of 1966, supposedly at the request of its Las Vegas office, evidence developed that these toll records were summoned in January of 1966. The chronology of events in these cases emerges as follows: The F.B.I. and the I.R.S. electronically monitored DiPiazza's conversations; F.B.I. agents raided DiPiazza's hotel room in January of 1966 and seized Deming's Cincinnati, Ohio, telephone number; I.R.S. agents summoned the toll records for that number in the same month, procured search warrants on the basis of the information contained in them, and seized the evidence that led to Appellants' convictions for violating wagering statutes and for conspiring to do so.

In overruling Appellants' motions to suppress, the District Judge found that the joint F.B.I.-I.R.S. electronic surveillance did not lead to the indictments against them. He found that the Las Vegas information did. Although some argument during the hearing on the motion to suppress was devoted to the use of the § 7602 summons in obtaining the toll records, the Government did not at any time allege that the investigation conducted by its agents had civil tax ramifications.

Coming to the propriety of the Government's use of the § 7602 summons, even if we assume that the joint electronic

surveillance did not lead the Government to the evidence used to convict Appellants, which is, I believe, a highly questionable assumption, it is abundantly clear that the F.B.I. and the I.R.S. were not interested in Appellants' civil federal income tax liability. Special I.R.S. agent Wetherill, who obtained the search warrants, revealed as much during the hearing on the motion to suppress. In the colloquy that follows, Appellants' counsel was attempting to ascertain from Wetherill how he know that DiPiazza was a "nationally known bookmaker" as he had alleged in the affidavits supporting the search warrants:

"Q. Now, again I ask you what makes a suspected bookmaker?

A. Suspected bookmaker is a person that I believe to be engaged as a bookmaker.

Q. But who does not have a stamp, does not pay an excise tax and who has not been convicted; is that correct?

A. Yes, sir.

Q. Now, explain to me why you refer to Sam DiPiazza, who has not been arrested, not been convicted and who has never had a stamp as a nationally known bookmaker?. Look at your affidavit and tell me why you made such a statement.

Mr. Michael: I object to one part of the question if it said he has never been arrested. We have information to the contrary.

Mr. Johnson: May I rephrase the question, I didn't mean to say arrested.

The Court: Forget the arrested.

Q. Do you know whether or not he has ever had a stamp?

A. No, sir.

Q. Have you ever checked it?

A. No, sir.

Q. Do you know whether or not he has ever paid excise tax?

A. No, sir.

Q. Have you ever checked it?

A. No, sir.

Q. Have you ever checked whether he has ever been convicted?

A. No, sir.

Q. However, you swear he is a nationally known bookmaker?

A. For the years I have been in the Service, for these years I have been in the Service I have heard and been told that Sam DiPiazza is a bookmaker."[4]

But there is more than the subjective intent of the agents in these cases to show that this was from start to finish a criminal investigation. The I.R.S. Special Agent, like Wetherill and all of the agents who participated in these cases, does not assess civil liability. He, like his agent colleague in the F.B.I., has a far more grave responsibility:

> "A special agent is a criminal law enforcement officer and just like any state or municipal detective or policeman." N.Y.U. 20th Inst. on Fed. Tax 1081, 1087. (1962).

Congress has authorized the Commissioner of Internal Revenue to investigate both civil and criminal offenses against the revenue. The first of these functions is carried out by the revenue agent who is usually assigned to the Service's Audit Division. His job is to see that taxpayers accurately report their income and pay the tax owing on it. The special agent, on the other hand, is assigned to the Service's Intelligence Division. His function, as stated

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[4] As the U.S. Supreme Court said in *Spinelli* v. *United States*, 393 U.S. 410, 418-419 (1969), "a simple assertion of police suspicion" that someone "was known . . . as a gambler" may not provide a basis for a finding of probable cause for a search warrant nor "be used to give additional weight to allegations that would otherwise be insufficient". See *Aguilar* v. *Texas*, 378 U.S. 108 (1964).

above, is to investigate criminal offenses against the revenue. *Wild* v. *United States*, 362 F.2d 206 (4th Cir. 1966). When a taxpayer may be subject to increased liability for taxes as well as criminal penalties, the revenue agent and the special agent will work together in a joint investigation. Thus, for example, where a revenue agent suspects fraud on the part of a taxpayer that would deprive the Government of tax dollars and possibly subject the taxpayer to criminal penalties, he will call in the special agent:

> "When a Special agent enters the picture, it is an entirely new investigation, for a new purpose, and the civil tax liability is no longer involved." NYU 20th Inst. on Fed. Tax 1081, 1087 (1962).

As mentioned above, no Revenue agent ever took part in the Government's investigation. The summoning of the telephone records, the stakeout of the Woodford Road apartment, and the seizure of all the evidence against Appellants was handled by special agents of the Internal Revenue Service whose function it is to "investigate criminal offenses against the revenue." This takes on crucial significance in light of the Supreme Court's holding that a summons authorized under 26 U.S.C. § 7602 cannot be used where the I.R.S. has for its purpose the obtaining of evidence for use in a criminal prosecution. *Reisman* v. *Caplin*, 375 U.S. 440 (1964); see *Boren* v. *Tucker*, 239 F.2d 767 (2d Cir. 1956); *United States* v. *DeGrosa*, 405 F.2d 926 (3d Cir. 1969); *United States* v. *Caplin*, 255 F. Supp. 805 (E.D. Mich. 1966).

I believe that the majority paints with too broad a brush when it says that the courts will grant enforcement to the § 7602 summons "[w]here the investigation may produce both civil and criminal evidence." The cases that the majority cite in support of that statement, namely, *United States* v. *Powell*, 379 U.S. 48 (1964), and *Ryan* v. *United States*, 379 U.S. 61 (1964), say that the Commissioner must

show that the investigation is "pursuant and relevant to" a legitimate purpose, which is, in the language of § 7602:

> "[To] ascertain the correctness of any return where none has been made, determine the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability . . . ."

I submit that none of these purposes were present here. See *Boren* v. *Tucker*, 239 F.2d 767 (9th Cir. 1956).

While courts have granted enforcement to the § 7602 summons where the investigation might lead to a criminal prosecution the thrust, purpose and scope of the investigation at the outset was to determine the liability of the taxpayer for taxes owed to the Government. *United States* v. *Kleckner*, 273 F.Supp. 251 (S.D. Ohio, 1967), appeal dismissed, 382 F.2d 1022 (6th Cir. 1967).

It is a far different thing to say as the majority does in defense of the summons issued in these cases that there was "a possibility that there would be a finding of civil tax liability." We have a deep and fundamental tradition in this country given force through our Constitution that prevents Government agents from rummaging at will into the private lives of citizens with the expectation that something useful may turn up. Accordingly, I cannot condone the sweeping use of the § 7602 summons in these cases which enabled the I.R.S. to seize knowledge of Appellants' telephone conversations. I do not believe that the executive branch of our government is entitled to wield such power, nor can I excuse its exercise here on the ground that Government agents believed that the rewards flowing from their actions would more than justify their unfettered intrusion into Appellants' private lives.

While I am in accord with the ultimate goal of law enforcement agencies in stamping out organized crime in this

country, these agencies must nevertheless proceed in a manner consistent with existing court decisions, congressional mandate, and constitutional limitations. It is my opinion that they have failed to do this.

Since it is my belief that the sole purpose of the investigation in these cases was to gather evidence for use against Appellants in a criminal prosecution, I submit that the § 7602 summons were not "other lawful authority" within the meaning of § 605 of the Communications Act. Accordingly, the information found in the toll slips could not be disclosed to the Commissioners. 47 U.S.C. § 605; *Alderman* v. *United States*, 394 U.S. 165 (1969). Without this information, the Government could not meet the standards for probable cause established in *Spinelli* v. *United States*, 393 U.S. 410 (1969), and *Aguilar* v. *Texas*, 378 U.S. 108 (1964).

I would therefore reverse.

**Opinions of the United States Court of Appeals for the Sixth Circuit in United States and Daguanno v. Michigan Bell Telephone Company.**

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 19073

UNITED STATES OF AMERICA AND RICHARD DAGUANNO, Special Agent, Internal Revenue Service, *Petitioners-Appellants*,

v.

MICHIGAN BELL TELEPHONE COMPANY, *Respondent-Appellee.*

Appeal from the United States District Court for the Eastern District of Michigan.

Decided September 11, 1969.

Before: PHILLIPS and CELEBREZZE, Circuit Judges, and MCALLISTER, Senior Circuit Judge.

PHILLIPS, Circuit Judge. The United States and Special Agent Richard Daguanno appeal from the District Court's denial of enforcement of an Internal Revenue summons issued under authority of 26 U.S.C. § 7602. Jurisdiction in the District Court was based on 26 U.S.C. § 7604(a). The District Court denied enforcement on the ground that the summons overstepped the power given to the Commissioner of Internal Revenue.

The sole question before this Court is whether the summons was valid under 26 U.S.C. § 7602. We hold that it was.

The case was tried on stipulated facts. The District Court held that the summons "was not issued for the purpose of determining the tax liability alone, but was pri-

marily intended as a criminal investigative tool." The parties had stipulated that Daguanno was a Special Agent assigned to investigate the tax liability of a named taxpayer for the years 1961 through 1966 and that it was necessary to his investigation to examine the telephone company toll records showing long distance calls to and from the taxpayer's telephone. The toll records were records which the company maintains in the ordinary course of its business. Daguanno had the authority to issue summonses under 26 U.S.C. § 7602 and purported to issue the summons to the telephone company under that authority. The final stipulation was:

> "6. That the Michigan Bell Telephone Company refused to appear and produce the required records and has continued to refuse to produce the required records for the sole and only reason that the United States of America and Special Agent Richard Daganno have declined to assure Michigan Bell Telephone Company that the records demanded are unconnected with any criminal investigation."

Clearly the telephone company has standing in this proceeding to challenge the lawfulness of the summons. *Reisman* v. *Caplin*, 375 U.S. 440, 445. However, it bears noting in this case that officers of the government are presumed to act lawfully. *Goldberg* v. *Truck Drivers Local Union No. 299*, 293 F.2d 807, 812 (6th Cir.), cert. denied, 368 U.S. 938. When a citizen is called upon through the medium of an Internal Revenue summons to provide information from his records, the citizen has a right to assume that the officer is acting properly and within his lawful authority. See *Bohnen* v. *Harrison*, 232 F.2d 406, 409 (7th Cir.), aff'd, 345 U.S. 946 (per curiam, equally divided court).

The Government may use a § 7602 summons properly when its investigation may have both civil tax liability and

criminal ramifications. *DiPiazza* v. *United States*, — F.2d — (No. 18,593, ————, 1969); *United States* v. *Hayes*, 408 F.2d 932, 936 (7th Cir.); see *United States* v. *Powell*, 379 U.S. 48; *Ryan* v. *United States*, 379 U.S. 61. Even assuming that the District Court was correct in its determination that the summons in this case was principally to investigate for criminal liability, the summons was proper since the Court did not exclude the possibility that the summons also was to determine civil tax liability. *United States* v. *DeGrosa*, 405 F.2d 926, 928 (3rd Cir.). The Section 7602 summons is inquisitorial. *United States* v. *McKay*, 372 F.2d 174 (5th Cir.); see *United States* v. *Powell*, 379 U.S. 48, 57.

The Commissioner of Internal Revenue is entitled to enforcement of his summons when he shows:

> "[T]hat the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed . . . ." *United States* v. *Powell*, 379 U.S. 48, 57-58.

However, the summons will not be enforced where to do so would abuse the process of the court.

> "Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation. The burden of showing an abuse of the court's process is on the taxpayer, and it is not met by a mere showing, as was made in this case, that the statute of limitations for ordinary deficiencies has run or that the records in question have already been once examined." Id. at 58.

We hold that an abuse is not shown by the fact that the government refuses to give up its right to use lawfully acquired evidence in aid of a possible future criminal prosecution.

Because of our disposition of this case we need not deal with the District Court's factual conclusion that the investigation was primarily for criminal information. We observe, however, that we find no evidence to support this conclusion. The government's refusal to give the assurance demanded by the telephone company will not support the inference of an intent to use the evidence exclusively for purposes of criminal prosecution. The records of both incoming and outgoing calls may be relevant to the question of tax liability.

This Court held in *DiPiazza* v. *United States*, —F.2d — (No. 18,593, ————, 1969), that the summons under 26 U.S.C. § 7602 is "other lawful authority" within the meaning of 47 U.S.C. § 605 and that the submission of toll records by the telephone company in response to such a summons does not violate § 605. That case was decided under § 605 as it stood prior to amendment by Title III, § 803, of the Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351, which was enacted before the decision of the District Court in the present case. Because the District Court decided this case on the basis of its conclusion that the summons authority itself was abused, it did not reach the issue of whether under the amended § 605 the summons authorized by 26 U.S.C. § 7602 is "other lawful authority." Since the telephone company elected not to file a brief before this Court, we have neither the benefit of a District Court decision nor of adversary briefing on this issue. In view of its importance we decline to pass on this issue as a basis for possible affirmance of the District Court decision under these circumstances.

The decision of the District Court is vacated and the case is remanded for determination of the question of the effect

of the amendment of § 605 and for further proceedings consistent with this opinion.

CELEBREZZE, Circuit Judge, concurring. I concur for the reason that the District Judge did not find that the sole purpose of Agent Daguanno's investigation was to gather evidence for a criminal prosecution. The parties stipulated that agent Daguanno was assigned to investigate one Montgomery's income tax liability for the years 1961 through 1966. During the course of his investigation he attempted to summon records of Montgomery's long distance telephone calls. Thus, aside from, but not inconsistent with, the District Court's finding that agent Daguanno's investigation was "primarily" criminal in scope, the record reveals that his investigation was also conducted for a civil purpose, namely, to determine Montgomery's liability for federal income taxes for the above-mentioned years.

It is well settled that the § 7602 summons may be used where the I.R.S. investigation has civil as well as criminal objectives. *United States* v. *DiGroso,* 405 F.2d 926 (3rd Cir. 1969); *Wild* v. *United States,* 362 F.2d 206 (9th Cir. 1966); see *Justice* v. *United States,* 365 F.2d 312, 313 (6th Cir. 1966). The United States Supreme Court has held, however, that this summons may not be used where the sole purpose of the I.R.S. investigation is to gather evidence for use in a criminal prosecution, *Reisman* v. *Caplin,* 375 U.S. 440, 449 (1964); see *Boren* v. *Tucker,* 239 F.2d 767 (9th Cir. 1965). In my opinion this was the purpose of the investigation conducted in *DiPiazza et al.* v. *United States,* —— F.2d —— (1969).[1] As I said in my dissenting opinion therein, the record did not disclose that the I.R.S. was conducting an investigation into the Appellants' civil tax liability. The record in this case, however, does disclose such a purpose. For this reason, the summons against Appellee

[1] Decided by this Court today.

would have been properly enforceable as "other lawful authority" under § 605 as it stood prior to its amendment by Congress in 1968.

I express no opinion at this time as to the effect of the recent congressional amendments on § 605, preferring to wait until that question is properly before us.